NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CITY OF MOUNTAIN VIEW et al., Plaintiffs and Appellants, v. DAORO, ZYDEL & HOLLAND et al., Defendants and Appellants.	A121628 (City & County of San Francisco Super. Ct. No. 453560)

This case involves a dispute over the rents due for land underlying the Shoreline Amphitheatre that is leased by plaintiffs and appellants to a private partnership. The City of Mountain View (City) and the Shoreline Regional Park Community (Shoreline) argued that Shoreline Amphitheatre Partners (Partnership) grossly underpaid the rents by approximately $25 million. The City and Shoreline sued the accountants who were obligated to audit the Partnership's lease payments, arguing that deficiencies in the audits caused the underpayments. A jury returned a defense verdict that found two of three defendants were negligent and breached their duties under the lease, but that plaintiffs suffered no harm as a result of the defendants' negligence.

Plaintiffs appeal and defendants cross-appeal. Plaintiffs contend the verdict is tainted by prejudicial jury misconduct; that the trial court should have limited or excluded testimony offered by defendants' accounting expert; and that the evidence is insufficient to support a judgment for defendants. In their cross-appeal, defendants argue their fee and cost award is insufficient because the trial court declined to award them the fees they paid their expert.

We find no merit in either side's contentions. Plaintiffs did not establish that the verdict is tainted by juror misconduct. Defendants' expert testimony was properly admitted, and the jury's verdict is supported by the evidence. The denial of an award of expert expenses to the defendants was within the trial court's discretion. We affirm the judgment and the order taxing costs.

BACKGROUND

The Lease

In the mid-1980's, production company Bill Graham Presents, Inc. entered into a lease agreement with the City and Shoreline whereby it was to build and operate an amphitheatre on a City-owned site in the Shoreline Regional Park. Bill Graham Presents formed the Partnership to facilitate the lease transaction and construction of Shoreline Amphitheatre. The parties to the lease agreement were the City, Shoreline,[1] and the Partnership. Bill Graham Presents and Bill Graham Enterprises, Inc. signed the lease as guarantors of the Partnership's obligations. Bill Graham Presents and the Partnership also executed a sublease under which Bill Graham Presents would operate the amphitheatre.

The rent payable under the lease was derived from a series of complex calculations that included a provision that required the Partnership to pay a percentage of the gross receipts earned from operating the amphitheatre. The lease defined "Gross Receipts" to include receipts from ticket, concession and merchandise sales, and "miscellaneous income" related to advertising, sponsorships and telecast, broadcast and video production payments. Gross receipts also included income from ticket and concession sales from any "other venue" with a seating capacity of 7,000 or more "owned, operated or managed by" the Partnership, Bill Graham Presents or Bill Graham Enterprises within 35 miles of the amphitheatre.

---

[1] Shoreline is a governmental special district formed by the state Legislature in 1968.

The Partnership sought commercial financing to construct the amphitheatre, but its lender backed out of the loan. The City then agreed to provide the necessary capital in exchange for a larger share of gross receipts, and the parties added new terms to the lease to reflect the obligation owed to the City. Section 4.01 of the lease provides that if the Partnership sells "all or any portion of its interest" in the amphitheatre, the City will receive 10 percent of the sale proceeds in excess of a specified amount. Section 4.07 provides that the Partnership would pay 20 percent of its "Net Available Cash," as defined by the lease, as additional annual rent.

Defendants' Engagement

Bill Graham Present's monthly rent payments to the City were based on its internal calculations of gross receipts. The parties also agreed that each year "an annual reconciliation shall be completed, wherein an independent auditor, named by City but compensated by Partnership, shall audit Partnership for compliance with this Lease and determine what, if any, remaining funds are due and owing City based upon the rental provisions above." Wilson, McCall & Daoro (Wilson firm) was retained to prepare the annual reconciliation reports from 1986 through 1996, and Daoro, Zydel & Holland (Daoro firm) from 1996 through 2004. Robert Yoshioka was a partner or principal of both firms during the relevant periods and was the certified public accountant responsible for the annual reconciliation audits.

The Bill Graham Entities, Including the Partnership, Change Hands

Bill Graham died in 1991. For the next seven years Bill Graham Presents and Bill Graham Enterprises were owned and operated by essentially the same people who had operated them under Graham. In 1998, Graham's team sold all of the Bill Graham business entities to SFX Entertainment, Inc. (SFX). In 2000 or 2001, SFX merged with Clear Channel.

The City Sues Yoshioka and the Accounting Firms

In 2006, the City and Shoreline sued Yoshioka, the Wilson firm, the Daoro firm, and two other accounting firms[2] for their alleged failure to accurately perform the audits required under the lease and report additional amounts that were owed to the City. The complaint alleged causes of action for professional negligence/malpractice, intentional and negligent misrepresentation, violations of the California False Claims Act, and theft of public funds. The City sought damages of approximately $25 million.

After a three-week trial, the jury returned a defense verdict. The jury found that the Daoro firm and Yoshioka were professionally negligent, but that their negligence was not a substantial factor in any harm to the City. On the breach of contract claim, the jury found the Daoro firm and Yoshioka failed to do something required by the Lease, but, again, the City and Shoreline were not harmed by that failure. The jury rejected the other causes of action and judgment was entered in favor of defendants.

Plaintiffs moved for a new trial on grounds of juror misconduct, improper admission of expert testimony, and insufficient evidence. They also moved for judgment notwithstanding the verdict, arguing the evidence was insufficient to permit a judgment for defendants. The court denied both motions. Plaintiffs timely appealed from the judgment and postjudgment orders. The Daoro firm, the Wilson firm and Yoshioka cross-appeal from the court's order taxing costs.

DISCUSSION

I. Juror Misconduct

A. *Background*

The foreperson of the jury, Juror D., was a lawyer. Plaintiffs' motion for new trial alleged that Juror D. engaged in several forms of misconduct. They include his alleged failures to disclose during voir dire relevant information concerning his legal experience and his relationship with one of the attorneys involved in drafting the lease, and that he

[2] Defendants Wilson, McCall & Associates and Creed & Associates were dismissed before trial.

instructed jurors on the law during deliberations. While plaintiffs discuss these accusations in their appellate briefs, their only legal argument to this court supporting their claim that Juror D. engaged in misconduct is that he instructed the jury on the law they should apply in construing and applying section 4.01 of the lease. Accordingly, we will address the claim concerning the interpretation and application of section 4.01, and we deem the other claims of misconduct waived for appeal. (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 876, fn. 1; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.)

Section 4.01 of the lease is the provision that guarantees the City a portion of the proceeds in the event the Partnership sells its interest in the amphitheatre. Plaintiffs' expert accountant testified that the application of section 4.01 was triggered when the Bill Graham entities were sold to SFX in 1998, and that as a result of that sale the Partnership owed the City $4.2 million as its share of the sales price.

When the City's expert concluded his testimony, Juror D. sent the trial court a note that asked the following questions: "Does the witness distinguish between the transfer at [Bill Graham] Presents stock following Bill Graham's death on October 25, 1991, and the sale of stock in [Bill Graham] Presents to SFX in 1997? [¶] Please explain? [¶] If the two transactions were substantially similar, does the lease allow for the application of Section 4.01, sale of interest, to multiple successive transactions, or should the clause only be applied once? [¶] If yes, is there a double or successive recovery problem? [¶] Please explain?" The trial court discussed the note with counsel and decided not to respond to it.

Defendants' accounting expert, Everett Harry, disagreed with plaintiffs' expert. Harry testified the SFX transaction did not trigger application of section 4.01 because the stock purchase agreement between the Bill Graham entities and SFX was not a sale of the amphitheatre. He explained: "there's a major difference between a stock purchase agreement and an asset purchase agreement. . . . [I]f you sell your stock, you're selling an investment interest in something, but you are not selling the assets." Harry also said it was significant that plaintiffs knew about the SFX sale in 1998, but did not claim that it triggered application of section 4.01 and their entitlement to more rent until 2006.

B. *The Alleged Juror Misconduct*

According to a declaration from another juror that was submitted by plaintiffs, Juror D. said during deliberations that if any sale triggered section 4.01, it was the 1993 sale from Bill Graham's estate, that "the City gets 'one bite of the apple,' [and] that the City cannot come back every time there is a sale and collect the percent of rent." Plaintiffs contend this was misconduct because it introduced extraneous information that conflicted with the evidence. The trial court rejected plaintiffs' contention in a written ruling that explained: "Considering the pleadings, evidence, and arguments, the Court finds plaintiffs do not show that juror [D.] presented evidence outside of what was presented at trial. The opinions expressed by juror [D.] were based on the evidence. The conclusions he made were within the confines of the evidence and the arguments made at trial. His statements about interpreting the contract were the same arguments put forth by the defendants as to this matter. As noted [in] <u>In re Malone</u>, 12 Cal.4th 935, 963 (1996), '[i]t is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial.' The Court finds juror [D.'s] statements in question do not constitute juror misconduct and his voir dire statements were honest and complete."

C. *Analysis*

We review the trial court's ruling de novo to determine whether there was juror misconduct and, if so, whether it was prejudicial. (*People v. Cumpian* (1991) 1 Cal.App.4th 307, 311-312.) However, we accept the trial court's credibility determinations and findings on questions of historical fact where supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582 & fn. 5; see also *People v. Perez* (1973) 9 Cal.3d 651, 660; *Bardessono v. Michels* (1970) 3 Cal.3d 780, 795-796.)

"It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963; accord, *McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 263.) "When extraneous law enters a jury room—i.e., a statement of law not given to the jury in the instruction by the court—the defendant is denied his constitutional right to a fair trial unless the People can prove that no actual prejudice resulted." (*Young v. Brunicardi* (1986) 187 Cal.App.3d 1344, 1349-1350.)

Plaintiffs argue Juror D.'s "one bite of the apple" comment was misconduct because it (1) improperly instructed the jury on contract interpretation, and (2) was contrary to the evidence presented at trial. We disagree. It was neither a legal instruction, nor based on extraneous evidence.

We can readily dispose of any argument that Juror D. instructed the jury on the legal significance of section 4.01. In its context, it is unreasonable to construe the comment as an instruction on the law. Juror D.'s understanding that if section 4.01 applied to stock sales, it would apply only to the first stock sale was one (albeit not the only) logical interpretation of its terms. It was not an instruction on the legal principles that would govern its interpretation. Juror D.'s status as a lawyer did not prohibit him from presenting his view of the contract's meaning during deliberations, just like any other juror. "A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, *but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence.* (*People v. Steele* (2002) 27 Cal.4th 1230, 1266, italics added; see also *In re Malone*, *supra*, 12 Cal.4th at

p. 963 [jurors' views of the evidence "are necessarily informed by their life experiences, including their education and professional work"].)

The argument that Juror D.'s construction of section 4.01 was contrary to the expert evidence requires only slightly more discussion. Plaintiffs complain that Juror D.'s "one bite of the apple" theory was improper because it was "undisputed and confirmed by [defendants'] expert" that section 4.01 "could be triggered more than once." The obvious answer to this contention is: so what? As the jurors were correctly instructed, they did "not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision." (See *Ortzman v. Van Der Waal* (1952) 114 Cal.App.2d 167, 170-171.) Moreover, in making this argument plaintiffs mischaracterize defendants' expert testimony. Harry did *not* say it would be unreasonable to interpret section 4.01 as applying only to the first stock sale. He said only that he *was not aware of* any language in the lease that limited the payment obligation contained in section 4.01 to one or two occurrences during the life of the lease.[3]

Finally, we will briefly address the claims that plaintiffs waived by not addressing them with argument or analysis in their briefs. They say that Juror D. interjected extraneous information into deliberations when he allegedly said: (1) "the written language of a contract is written in a very precise manner"; (2) "in his experience parties to an agreement spend a lot of time going back and forth and coming up with the specific language in a contract"; (3) "every word in a contract has meaning"; and (4) "when a contract is written using vague terms, it is vague for a reason." The trial court found that any such statements "were within the confines of . . . arguments made at trial" and "were

[3] The testimony is as follows: "Q. And you had that same understanding for all the provisions under Article IV [that they were to continue for the life of the Lease], did you not? [¶] A. I'd have to read each one, but I didn't see anything that put a term limit by date on any provisions that I read. [¶] Q. Right. So you are not aware of anything in the lease that says this only happens one year, doesn't happen a different year, only can happen one or two times during the lease. You never saw anything like that, did you? [¶] A. It's a long lease, but generally that's correct."

the same arguments put forth by the defendants as to this matter." The record confirms this finding.

Defense counsel argued to the jury that the City and its attorneys spent over a year negotiating the lease, "with attorneys drafting the wording of the agreement and faxing them back and forth," and that if the lease doesn't say what the City would like it to say "it's because in the course of the negotiations they didn't get what they wanted." Counsel also argued that "you can assume that when lawyers draft agreements and spend as much time and as much care doing this, when they use different words and different terminology, they probably meant different things."

With respect to the provision of the lease requiring the Partnership to pay income from "other venues," defense counsel argued that if the parties meant to include Graham's promotion of events at venues falling under the "other venues" clause, they would have used the word "promote." Juror D.'s alleged comments were appropriate references to defense counsel's arguments.

Juror D. committed no misconduct. If plaintiffs did not want a juror with relevant legal experience, they could have exercised a peremptory challenge. What they may not do is wait for an adverse verdict and then express their dismay that a lawyer was allowed to remain on the jury.

II. Expert Testimony

Plaintiffs also contend that the court erred when it denied their motion to exclude or limit testimony from defendants' expert accountant, Everett Harry, and again when it denied their motion for a new trial brought on the same ground. Both motions were premised on plaintiffs' contentions that Harry was unqualified to opine on the relevant standard of care and lacked a reasonable basis to provide opinions for 12 years of the lease term. We disagree.

We turn first to the question of Harry's qualifications. "The trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse. [Citation.] ' "Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility." ' " (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322; *People v. Bloyd* (1987) 43 Cal.3d 333, 357.)[4]

Plaintiffs claim Harry's lack of expertise in and knowledge of relevant accounting rules rendered him unqualified to render an opinion on whether defendants satisfied the standard of care. Specifically, they contend Harry could not identify the Generally Accepted Auditing Standards (GAAS) that governed the annual reconciliation audits performed under the lease. They cite a snippet of deposition testimony to support their argument where Harry was unable to identify *by number* the applicable sections of the GAAS auditing standards "without pulling out some books and looking at them." But, as Harry testified at trial, "It's a very, very large book. I don't memorize all the numbers in it. I don't memorize page numbers out of the encyclopedias. I can tell you the concepts." The court sensibly rejected the notion that the cited testimony demonstrates that Harry lacked knowledge and experience.

A review of the record also shows there was ample basis for the court to reject plaintiffs' more general contention that Harry was insufficiently versed in both GAAS and GAAP (Generally Accepted Accounting Principles).[5] Harry was a certified public accountant with an M.B.A. from the University of Southern California, who testified about his substantial relevant experience in compliance audits. He was retained by the

---

[4] Plaintiffs, who cite *Bolin* on another point, insist that review is de novo because "the decisive facts are undisputed." But whether or not the facts are disputed, the California Supreme Court has made it clear that whether a witness is qualified to give expert testimony is a matter for the court's discretion and is reviewed for abuse of that discretion.

[5] Harry's declaration in opposition to plaintiffs' motion in limine specified that GAAS, not GAAP, provides the applicable rules in this case. "In simple terms, GAAS covers the objectives, means and methods of rendering certain CPA professional services. On the other hand, GAAP is a body of rules about how accounting transactions are recognized, measured, recorded and reported. . . . Accountants' Annual Reconciliation Reports reported the results of applying GAAS to produce financial statements in accordance with the accounting requirements of the Lease, which were not necessarily in accordance with GAAP."

City and County of San Francisco to audit the payroll records of accounting and law firms to determine whether they correctly paid payroll tax on partner compensation; to evaluate whether single room occupancy hotels paid the appropriate percentage of receipts in city hotel tax; and to audit Pier 39 to determine whether it correctly paid rent measured by sales, concessions, and restaurant business. Harry has testified as an expert witness 30 or more times over his 30-year career. Those experiences include his appointment as a special master in litigation over whether a company's auditor and three other international public accounting firms properly applied GAAS and GAAP to determine company profits owed to former shareholders under an "earn out" agreement. The trial court did not abuse its discretion when it qualified Harry as an expert.

Plaintiffs also argue that Harry was unqualified because he was ignorant as to GAAP or other requirements for reporting barter transactions; that he "never signed an audit of any type"; and that he "had never been qualified to testify regarding the standard of care."[6] But when a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the degree of his knowledge goes to the weight of his testimony, not its admissibility. (*People v. Bolin, supra,* 18 Cal.4th at pp. 321-322; *Seneris v. Haas* (1955) 45 Cal.2d 811, 833.) This is such a case.

Plaintiffs challenge the basis for Harry's opinion because he did not examine defendants' work papers for the years 1986 through 1998. This argument is also unpersuasive. As a general matter, Harry explained that his analytic approach was to start with the specific accounting transactions challenged by the plaintiffs' accountants and to review the defendants' work papers that were relevant to each of those challenged transactions. Plaintiffs assert the work papers for each year were significant because over the years defendants "changed the way they reported transactions," but they do not explain how any such alleged changes affected the transactions they challenged at trial.

---

[6] Defendants dispute plaintiffs' claims as mischaracterizations of the record and/or Harry's experience.

In any event, Harry denied that it was necessary for him to review the working papers for 1986 through 1998 in order to opine on whether defendants satisfied the standard of care during that period. He testified that he had reviewed the nature of plaintiffs' claims for those years and knew that they were the same as the claims he examined in detail. For example, when asked about whether the 1998 sale to SFX triggered additional rent under the lease, Harry acknowledged he had not reviewed defendants' work papers for that year but explained exactly how he concluded that the provision for additional rent was not triggered: "Q. So you wouldn't know whether or not they violated the standard of care in how they reported on this transaction, would you? [¶] A. I would. It's not reported. I have read the lease to determine if it should be reported. I have read the Stock Purchase Agreement. I have looked at other documents to arrive at a conclusion that its absence was appropriate. It should not have been reported." There was a reasonable basis for Harry to provide expert testimony and the trial court did not abuse its discretion when it rejected plaintiffs' contrary contentions.

III. Sufficiency of the Evidence

Plaintiffs argue the evidence was insufficient to support the verdict, and that the court should have granted their motions for new trial and judgment notwithstanding the verdict on that ground. Their specific claim is that the evidence was insufficient to support the jury's findings that plaintiffs were not harmed by defendants' negligence and breach of contract. Plaintiffs have it backwards. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) It was plaintiffs' burden to prove each element of their causes of action—including the existence of damages and the causal link between the defendants' actions and those damages. (See, e.g., *McKellar v. Pendergast* (1945) 68 Cal.App.2d 485, 489 [tort]; *Bruckman v. Parliament Escrow Corp*. (1987) 190 Cal.App.3d 1051, 1063 [contract]; *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 775 [contract]; see generally *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668, 1670-1671.) Plaintiffs' argument assumes the opposite: that defendants had the burden to disprove causation.

That, patently, is not the law. It was the City's job to prove that it was harmed by defendants' negligence or breach of contract, and it was the jury's prerogative to find the City failed to do it. Moreover, there was a reasonable basis for the jury's finding that plaintiffs suffered no damages. For example, the jurors could have found that defendants adhered to the wrong accounting principles in conducting audits, but that their error did not cause any monetary loss to plaintiffs. Defendants were under no obligation to provide evidence that disproved an element of plaintiffs' causes of action.

IV. The Cross-appeal

Defendants cross-appeal from a postjudgment order taxing $78,000 in expert witness fees that defendants claimed as costs under Code of Civil Procedure section 998.[7] Pursuant to section 998, until 10 days before trial "any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." (§ 998, subd. (b).) If the offer is not accepted within 30 days or before trial, it is deemed withdrawn. (§ 998, subd. (b)(2).) If a plaintiff rejects a section 998 offer and then fails to obtain a more favorable result at trial, the plaintiff "cannot recover its postoffer costs, must pay

[7] In relevant part, Code of Civil Procedure section 998 provides: "(b) Not less than 10 days prior to commencement of trial or arbitration . . . any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. . . . [¶] . . . [¶] (2) If the offer is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial or arbitration. [¶] . . . [¶] (c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

the defendant's costs from the time of the offer, and may be held liable (as was the case here) for a reasonable sum to cover the defendant's expert witness fees." (*Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498, 504.)

Defendants made the City and Shoreline a joint offer to settle this case for $2 million dollars. The offer stated: "This Offer to Compromise is made pursuant to the provisions of section 998 of the Code of Civil Procedure. Defendants Daoro, Zydel & Holland, Robert Yoshioka, and Wilson, McCall & Daoro (collectively 'defendants') offer to pay plaintiffs two million dollars ($2,000,000) in exchange for the following: a dismissal by plaintiffs with prejudice of the complaint with respect to defendants; and a written release by plaintiffs in favor of defendants of all known and unknown claims related to the subject matter of the complaint in this action. Each party shall bear its own costs and attorney's fees." Plaintiffs objected to the offer, arguing, inter alia, that it was invalid because it was contingent on joint acceptance by both plaintiffs and required a release of all claims. Defendants did not amend their offer, and plaintiffs did not accept it.

After trial, plaintiffs moved to tax various costs claimed by defendants, including expert witness fees claimed under Code of Civil Procedure section 998. Plaintiffs argued the section 998 offer was invalid because: (1) it was conditional on acceptance by, and unapportioned as between, the two plaintiffs; (2) it was unapportioned as between the defendants; and (3) it required a release of all claims. Plaintiffs also contended the requested expert fees were unreasonable. The court denied the motion to tax as to some costs, but taxed the entire $78,000 of expert witness fees sought by defendants.

Because the soundness of the court's ruling depends upon the application of Code of Civil Procedure section 998 to undisputed facts, it presents a legal issue that we review de novo. (*Peterson v. John Crane, Inc.*, *supra*, 154 Cal.App.4th at p. 505; *Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 130.) The legal principles we apply are well established. " '[A] section 998 offer made to multiple parties is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them. [Citations.] A single, lump sum offer to multiple plaintiffs which requires them to agree to apportionment among themselves is not valid. [Citation.] Likewise, a lump sum offer by a plaintiff to multiple defendants may be invalid for the same reasons. [Citation.]' [Citation.] ' "To be effective, an offer to multiple parties under section 998 must be explicitly apportioned among the parties to whom the offer is made so that each offeree may accept or reject the offer individually." ' " (*Westamerica, supra*, 158 Cal.App.4th at p. 130; *Menees v. Andrews* (2004) 122 Cal.App.4th 1540, 1544; *Weinberg v. Safeco Ins. Co. of America* (2004) 114 Cal.App.4th 1075, 1086; *Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 544; *Meissner v. Paulson* (1989) 212 Cal.App.3d 785, 791.)

Defendants have the burden of demonstrating the validity of their offer. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 799.) They have not done so. Although the offer was not allocated as between the City and Shoreline and required that both plaintiffs accept it, defendants contend their offer was nonetheless valid because it was within an exception to the general rule that is applied when multiple offerees share a " 'unity of interest such that there is a single, indivisible injury.' " (*Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th at p. 505.) Defendants rely on (1) testimony that plaintiffs' damages expert was asked only to analyze the entire amount of damages to both plaintiffs, without differentiating between Shoreline and the City; and, (2) a statement by plaintiffs' counsel that "the damages were jointly, you know, arrived at for the City as a whole because [Shoreline] and the City are both signatories on this lease. Therefore the damages flow to both parties." But just because Shoreline and the City are both parties to the lease, and both claim to have been injured by defendants' accounting practices, does not compel the conclusion that their interests are identical or indivisible. Defendants' single, lump sum offer to both plaintiffs was invalid because it would have required Shoreline and the City to agree on some method of apportionment between themselves. (*Weinberg v. Safeco Ins. Co. of America, supra*, 114 Cal.App.4th at p. 1086.) The fact that both sought damages based on the lease does not alleviate the concern underlying Code of Civil Procedure section 998 that "a single offer to two people can create a conflict between them if they have different views on whether to proceed with a case, resulting in the loss of an opportunity to settle at least one of the parties' claims." (*Peterson, supra,* at p. 508.)

Defendants' reliance on *Peterson* is misplaced. *Peterson* was an asbestos case where the decedent's widow sued John Crane, Inc. in three capacities: as an individual for loss of consortium, as successor in interest to her husband's survivor tort claims, and as her husband's legal heir on his wrongful death claims. (*Peterson v. John Crane, Inc. supra,* 154 Cal.App.4th at p. 506.) She rejected a Code of Civil Procedure section 998 offer, lost at trial, and then sought to tax the defendant's costs on the ground that its section 998 offer was not allocated between the three "plaintiffs." (*Peterson, supra,* at pp. 502-503.) Despite the multiple capacities in which she sued, the court held there was only one plaintiff based on the language of section 998. (*Peterson, supra,* at pp. 506-507.) Its holding has no relevance to the situation in which two distinct parties to one contract sue a third party for damages related to that contract. (*Ibid*.)

Defendants also state that plaintiffs "did not present any evidence that the Shoreline Regional Park Community suffered any damages separate and apart from those also suffered by the City of Mountain View." But it is the offeror's burden to establish the validity of the offer. (*Barella v. Exchange Bank, supra,* 84 Cal.App.4th at p. 799.) In this case, it was defendants' responsibility to establish that the "unity of interest" exception applies. Because they did not do so, the court correctly granted the motion to tax expert witness fees.

DISPOSITION

The judgment and postjudgment orders are affirmed. Defendants are awarded their costs on appeal.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.